

A **FFM MARKETING SDN BHD v. AZRIM SALEEMI**
 ABDUL KARIM & ORS

HIGH COURT MALAYA, SHAH ALAM
TUN ABD MAJID HAMZAH JC
[JUDICIAL REVIEW NO: BA-25-27-05-2017]
B 25 JANUARY 2019

C ***CIVIL PROCEDURE:** Judicial review – Application for – Application to quash decision or ruling by presiding officer – Employees lodged complaint with Director-General of Labour ('DGL') over employer's failure to pay overtime wages and reimburse deductions made – DGL issued compliance notice to employer, directing employer to pay overtime wages and reimburse deductions made to commissions and allowances – Presiding officer proceeded with summons – Whether presiding officer erred in law – Whether presiding officer acted within jurisdiction in proceeding with full hearing of summons – Whether presiding officer made ruling or decision –*
D *Whether decision final – Whether amenable to judicial review – Employment Act 1955, s. 69*

E ***LABOUR LAW:** Judicial review – Procedural impropriety – Employees lodged complaint with Director-General of Labour ('DGL') over employer's failure to pay overtime wages and reimburse deductions made – DGL issued compliance notice to employer to pay overtime wages and reimburse deductions made to commissions and allowances – Whether Employment Act 1955 provides for issuance of compliance notice – Whether DGL pre-judged issue by issuing compliance notice – Whether compliance notice had binding effect – Whether summons illegal and tainted*

F The applicant had employed the first and second respondents as truck sales supervisor and truck sales representatives, respectively, before they resigned and left the employment. The respondents lodged a complaint with the Director-General of Labour ('DGL') that they were not paid for their overtime wages and, in addition, the first respondent sought for the return of the deductions made to his commission and allowances. Satisfied that
G truck sales representatives were employees within the first schedule of the Employment Act 1955 ('the Act'), the DGL issued a compliance notice to the applicant, directing the latter to pay the overtime wages to the first respondent and to reimburse the deductions made. The applicant objected to this but the DGL did not respond. The DGL requested the applicant to pay
H RM70,491.94, if the latter did not resist the sum, or be present for the mention of the DGL summons ('the summons'). The summons were subsequently mentioned and after dismissing preliminary objections raised, the presiding officer proceeded with the hearing of the summons. Hence, the
I present application for judicial review, sought by the applicant, over the decision of the presiding officer in deciding to proceed with the hearing of

the first and second respondents. In support of the application, the applicant submitted that, *inter alia*, (i) s. 69 of the Act envisages two legal premises, namely under contract of service and under the Act. The summons, which were issued under s. 69(1)(a) of the Act, fell within the contract of service and therefore, the DGL ought to have ascertained, from the contract of service, whether overtime wages were provided for in respect of both respondents, which was none. Hence, there was no precedent fact to trigger the DGL to assume his authority under sub-s. 69(1)(a) of the Act; (ii) the presiding officer erred in taking into account irrelevant considerations in that she should hear the witnesses in order to decide whether the respondents were employees of the Act; (iii) the DGL had, by the compliance notice, opined that the respondents were employees under the Act and, by proceeding with the summons, the DGL would be biased as he had pre-judged the issue; and (iv) the summons were tainted as under Part XIV of the Act, the power of the DGL is to conduct inspections and enquiries, not to adjudicate a complaint and to issue a compliance notice.

Held (dismissing application with costs):

- (1) The impugned decision made was the ruling made by the presiding officer in holding an inquiry under s. 69 of the Act. The said ruling came about after the applicant raised a preliminary objection during the mention date of the inquiry. Having made the ruling or decision, the presiding officer ordered the parties to prepare to call witnesses and produce documents for the hearing of the inquiry. Therefore, the impugned decision was not final. At the end of the day, the applicant would be able to file an appeal against the decision of the inquiry. Clearly, what the applicant did was to fragment the decision. It was a ruling, rather than a decision, which did not dispose of the rights of the applicant. The ruling was not amenable to judicial review. (paras 23 & 24)
- (2) The Act does not provide for the issuance of the compliance notice. The DGL did not pre-judge the issue by issuing the compliance notice as it had no binding effect. When there was no response from the applicant, the summons were issued and the inquiry was set up. The question whether the matter was under sub-s. 69(1)(a) or (b) of the Act would only be decided by the inquiry. Although the compliance notice was unnecessary, it did not render the summons illegal. It was separate and distinct from the summons. An inquiry under s. 69 of the Act is independent and stands by itself and is not premised upon any initial investigation. Even if the compliance notice is illegal or unlawful, the summons were not tainted. (paras 25 & 26)

- A (3) If the present applicant was allowed by quashing the ruling, which would amount to allowing the preliminary objection, that would be the end of the matter and the first and second respondent would have no other recourse. However, that would not be proper as the proceedings have been instituted *ie* the inquiry and s. 86 of the Act only provides where such proceedings have been withdrawn. If the preliminary objection was upheld, by quashing the ruling, the inquiry would be set aside. If that was so, the first and second respondents would not be able to institute a civil suit against the applicant. (para 27)

Case(s) referred to:

- C *Abd Razak Atan v. Dato' Ahmad Ragib Mohd Salleh & Ors* [2010] 6 CLJ 887 CA (*refd*)
Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2012] 5 CLJ 865 FC (*refd*)
Australian Postal Corporation v. Barry [2006] FCA 1751 (*refd*)
Central Holdings Management Services Sdn Bhd v. Muhammad Zailani Mat Zin & Ors [2006] 6 CLJ 197 HC (*refd*)
- D *Craig v. The State of South Australia* [1995] 184 CLR (*refd*)
Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC (*refd*)
Kaneka Paste Polymers Sdn Bhd v. Ketua Pengarah Perhubungan Perusahaan & Ors [2005] 1 LNS 276 HC (*refd*)
L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] 7 CLJ 653 FC (*refd*)
- E *Marlin Rajiman & Ors v. MAA Services Sdn Bhd* [1994] 2 CLJ 591 SC (*refd*)
Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA (*refd*)
Mui Bank Bhd Johor v. Tee Puat Kuay [1993] 4 CLJ 69 HC (*refd*)
O'Reilly v. Mackman [1983] 2 AC 237 (*refd*)
- F *Pendaftar Pertubuhan Malaysia v. Establishmen Tribunal Timbangtara Malaysia & Ors* [2011] 6 CLJ 684 HC (*refd*)
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA (*refd*)
Shun Fat Container Service Co Ltd & Ors v. Commissioner for Transport [1989] 2 HKC 301 (*refd*)
- G *Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2009] 5 CLJ 153 CA (*refd*)
The British School of Kuala Lumpur Sdn Bhd v. Menteri Sumber Manusia Malaysia & Ors [2016] 1 ILR 289 (*refd*)

Legislation referred to:

- H Employment Act 1955, ss. 69(1)(a), (b), 70(c), 86
Internal Security Act 1960, s. 6
Rules of Court 2012, O. 53 r. 3(6)
For the appellant - Lim Heng Seng; M/s Lee Hishammuddin Allen & Gledhill
For the 1st & 2nd respondent - Avatar Singh; M/s Mohd Latip & Assocs
- I *For the 3rd respondent - Zaliha Mohd Janis SFC*
Reported by Najib Tamby

JUDGMENT

A

Tun Abd Majid Hamzah JC:

[1] The applicant is seeking for a judicial review over the decision of the Director General of Labour (the presiding officer) dated 10 April 2017 pertaining to Kes Saman Ketua Pengarah No. KBR/1040/2016/0710 (“summons”) in deciding to proceed with the hearing of the first and second respondents’ complaint and prays for the following declaration:

B

- (a) an Order for *Certiorari* to remove into this Honourable Court for the purpose of it being quashed the decision of the Director General of Labour, the 3rd Respondent herein, dated 10.4.2017 pertaining to the Director General Summons Case No.: KBR/10401/2016/0710 proper.

C

(“Director General Summons Case”) which decided to proceed to hear the complaint of the 1st and 2nd Respondents;

- (b) the following declarations;

D

(i) A declaration that the third respondent has no power and/or jurisdiction to enquire into complaint of the first respondent;

(ii) A declaration that the third respondent has no power and/or jurisdiction to enquire into complaint of the second respondent;

(iii) A declaration that the first and second respondents do not have a common cause for complaint against the applicant;

E

(iv) A declaration that the Compliance Notice dated 4.10.2016 which found that the Truck Sales Supervisors are employees within the ambit of the Employment Act 1995 (“EA 1955”) is null and void and ineffective;

F

(v) A declaration that the 1st Respondent is not entitled to overtime payment under the terms and conditions of his contract of service;

(vi) A declaration that the 2nd Respondent is not entitled to overtime payment under the terms and conditions of his contract of service; and

G

(vii) A declaration that the Applicant's Truck Sales Supervisors are not persons included in any category in the First Schedule of the EA 1955 and therefore not employees within the ambit of the EA 1955.

H

(c) that all necessary and consequential directions and orders be given;

(d) the cost and incidental costs of this application be provided; and

(e) all other and further relief which this Honourable Court deems fit and proper.

I

- A [2] The grounds are as follows:
- (i) error of law – non-existence of jurisdictional or precedent fact;
 - (ii) error of law – failure to take into account a relevant consideration;
 - (iii) error of law – procedural impropriety;
- B (iv) DGL has prejudged the dispute; and
- (v) the summons is tainted.
- C [3] The first respondent was a Truck Sales Supervisor after being promoted from a Truck Sales Representative under the employment of the applicant since 2 May 2012 and resigned on 30 September 2016. The second respondent was a Truck Sales Representative under the employment of the applicant since 21 March 2012 and left on 25 February 2016. It was alleged that the 2nd respondent had abandoned his employment without any notice.
- D [4] Both respondents subsequently on 21 September 2016 lodged a complaint with the Director General of Labour (“DGL”) that they were not paid for their overtime wages and in addition the first respondent seeks the return of the deductions made to his commission and allowances as a result of an accident involving the motor lorry driven by him. The chronology of events thereafter is as follows:
- E (i) The DGL issued a compliance notice dated 4 October 2016 to the applicant directing the latter to pay the overtime wages to the first respondent after being satisfied that Truck Sales Supervisors were employees within the First Schedule of the Employment Act 1955 (“Act”) and to reimburse the deductions made.
- F (ii) The applicant submitted an objection dated 17 November 2016. The DGL did not respond to this objection.
- (iii) On 28 December 2016 the DGL acting under sub-s. 69(1)(a) of the Act issued a letter to the applicant requesting the latter to pay a sum of RM70,491.94 if the latter did not resist the claim or else be present for the mention of the summons on 17 January 2017.
- G (iv) The summons was mentioned on 17 January 2017 where some preliminary objections were raised.
- H (v) The presiding officer *vide* a written decision dismissed the preliminary objections and decided to proceed with the hearing of the summons.
- I [5] The issue for determination is whether the presiding officer erred in law and/or acted in excess of his jurisdiction in exercising his statutory discretion to proceed with the full hearing of the summons.

Submissions*The Applicant*

[6] The learned counsel for the applicant submitted s. 69 for the purposes of this case envisaged two legal premises namely, one under the contract of service and another under the Act. The summons was issued under sub-s. 69(1)(a) of the Act therefore it fell within the contract of service. In such case the DGL ought to have ascertained from the contract of service whether overtime wages is provided for in respect of both respondents, which is none, hence, there was no precedent fact to trigger the DGL to assume his authority under sub-s. 69(1)(a) of the Act. He referred to *Judicial Review Handbook*, 6th edn by Michael Fordham QC, and *Pendaftar Pertubuhan Malaysia v. Establishmen Tribunal Timbangtara Malaysia & Ors* [2011] 6 CLJ 684 and *Craig v. The State of South Australia* [1995] 184 CLR 163.

[7] He further submitted that the respondents have no cause of action as their contracts of service do not provide for overtime and that the DGL should have referred to the respondents' contracts of service to see whether they have a valid cause of action against the applicant. In support he cited the case of *Australian Postal Corporation v. Barry* [2006] FCA 1751.

[8] It was further submitted by the learned counsel for the applicant that the DGL had failed to take into account that the contracts of service make no provision for overtime, therefore, it was illegal for the DGL to initiate the summons. References were made to *Mui Bank Bhd Johor v. Tee Puat Kuay* [1993] 4 CLJ 69 and *The British School of Kuala Lumpur Sdn Bhd v. Menteri Sumber Manusia Malaysia & Ors* [2016] 1 ILR 289.

[9] As regards the presiding officer the learned counsel submitted that she has also erred in taking onto account irrelevant consideration in that she should hear the witnesses in order to decide whether the respondents were employees under the Act.

[10] The learned counsel for the applicant further contended that there was procedural impropriety in that there was non-compliance with s. 70(c) of the Act. The DGL had failed to satisfy himself that 'the complaint discloses matters which in his opinion ought to be inquired into' in the sense that he did not ascertain whether the contracts of service provide for overtime before issuing the summons. The learned counsel cited *O'Reilly v. Mackman* [1983] 2 AC 237 where the court has to decide whether the procedure was mandatory or otherwise and *Central Holdings Management Services Sdn Bhd v. Muhammad Zailani Mat Zin & Ors* [2006] 6 CLJ 197 where it was held the provisions of ss. 69 and 70 were mandatory.

A

B

C

D

E

F

G

H

I

- A [11] It was further pointed out that the DGL had by the Compliance Notice
opined that the respondents were employees under the Act and by proceeding
with the summons he would be bias as he had prejudged the issue and that
the presiding officer was his subordinate. It was also submitted that under
B Part XIV of the Act the power of the DGL is to conduct inspections and
enquiries and not to adjudicate a complaint and to issue a Compliance
Notice. The dispute resolution mechanism can only be found in Part XV of
the Act. Hence, there was a violation of statutory provisions (*Syarikat
Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748).
The summons, according to the learned counsel for the applicant was
therefore tainted.

C

The First And Second Respondents

- [12] The learned counsel for the first and second respondents in his
response submitted that the applicant was out of time in filing this judicial
review as it was filed on 30 May 2017 which was beyond three months as
provided under O. 53 r. 3(6) of the Rules of Court 2012 citing *Menteri Besar
Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5
D CLJ 123; [2010] 5 AMR 220 where it was held that compliance with the
time frame was fundamental.
- E [13] He further submitted that the summons should be allowed to proceed
in order to adjudicate the complaint based on witnesses' testimonies and
should not rely on documents alone. He referred to *Marlin Rajiman & Ors v.
MAA Services Sdn Bhd* [1994] 2 CLJ 591; [1994] 2 MLJ 404 which dealt with
Industrial Court and that the same principles should apply.
- F [14] The impugned decision made on 10 April 2017 was premised on the
preliminary objections raised by the applicant which was dismissed by the
presiding officer. The preliminary objection pertained to the compliance
notice, the complainants not being employees under the Act and the Labour
Office has no jurisdiction to deal with the issues stemmed from the
compliance notice. In dismissing the preliminary objection, the presiding
G officer held that although the purpose of the hearing was to decide on the
complaints raised by the employees and also on the issue whether the
respondents were employees under the Act.
- H [15] The learned counsel contended that the issue over the compliance
notice has been overtaken by event ie, the summons itself. The applicant
complained that they were not given the opportunity to be heard before the
compliance notice was issued however, now with the full hearing being set,
the applicant would be able to ventilate their case.

I

[16] It was further pointed out that what were available before the presiding officer when the preliminary objection was raised were the two letters dated 17 November 2016 where the applicant questioned the issuance of the compliance notice and 13 March 2017 from the solicitors for the respondents responding to the preliminary objection. The court should not in a judicial review disturb the ruling by the presiding officer. The learned counsel referred to *Shun Fat Container Service Co Ltd & Ors v. Commissioner for Transport* [1989] 2 HKC 301 cited in *Abd Razak Atan v. Dato' Ahmad Ragib Mohd Salleh & Ors* [2010] 6 CLJ 887; [2010] 4 AMR 496.

A

B

[17] The learned counsel further contended that notwithstanding the DGL referred to sub-s. 69(1)(a) of the Act instead of (1)(b), the inquiry could also consider whether the complaint or dispute involved any provisions of the Act (sub-s. 69(1)(b)).

C

[18] It was also the submission of the learned counsel that the decision of the presiding officer was not a final decision as she has yet to hear the witnesses.

D

[19] The learned counsel also submitted that the dispute between the parties was a private law matter and he referred to *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2012] 5 CLJ 865.

[20] In addition, the learned counsel argued that the applicant should have appealed to the DGL as provided under s. 4 of the Act if they were not satisfied with the compliance notice instead they did not do anything until the summons was issued.

E

The Third Respondent

[21] The learned Senior Federal Counsel (SFC) for the third respondent submitted that in arriving at the decision 10 April 2017 the presiding officer had given the opportunity to both counsels to appear and argued on the preliminary objection raised by the applicant. Hence, there was no error committed in the decision making process. The case of *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 was cited in support of the argument.

F

G

[22] It was further submitted by the learned SFC that the DGL was empowered under ss. 69 and 70 of the Act to inquire and hear the complaint. The compliance notice being issued administratively and the real adjudication will be the inquiry by the presiding officer. Therefore, the compliance notice actually has no real effect.

H

I

A **Decision**

[23] The impugned decision made on 10 April 2017 was the ruling made by the presiding officer in holding an inquiry under s. 69 of the Act. The said ruling came about after the applicant raised a preliminary objection during the mention date of the inquiry on 17 January 2017. Having made the ruling or decision the presiding officer ordered the parties to prepare to call witnesses and produce documents for the hearing of the inquiry. Hence, the impugned decision is not final. In *Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2009] 5 CLJ 153; [2009] 3 MLJ 437 Suriyadi Halim Omar JCA (as he then was) at pp. 165-166 (CLJ); pp. 448-449 (MLJ) said:

[22] Apart from the reason as prognosed above, this appeal could also be dismissed on the ground that the judicial review application by the appellant merely served to fragment the decision making process and hence premature. We were not convinced that a 'decision' existed here that was amenable to judicial review in the context of judicial or administrative proceedings. The decision of the first respondent could not be said to have effectively disposed of the matter whereby its decision was final and determinative of the issue under consideration.

[23] The High Court in *Australian Broadcasting Tribunal v. Bond & Ors* 94 ALR 11 when considering whether a decision was amenable to judicial review under the provisions of the Administrative Decisions (Judicial Review) Act 1977 had occasion to remark:

... On the one hand, the purposes ... are to allow persons aggrieved by the administrative decision-making processes of government a convenient and effective means of redress and to enhance those processes. On the other hand, in so far as the ambit of the concept of 'decision' is extended, there is a greater risk that the efficient administration of government will be impaired ... To interpret 'decision' in a way that would involve a departure from the quality of finality would lead to fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process.

[24] In *Kaneka Paste Polymers Sdn Bhd v. Ketua Pengarah Perhubungan Perusahaan & Ors* [2005] 1 LNS 276; [2005] 5 MLRH 86 at p. 89 Raus J (as he then was) had this to say:

8. Looking at the whole scheme of s. 9 above, I am in agreement with the learned Senior Federal Counsel that the decision which can be reviewed under Order 53 of the RHC must be the decision of the Minister under s. 9(5). Section 9(1) to s. 9(4C) merely prescribes the procedures to be taken by the DGIR and the DGTU. But the power to grant recognition can only be made by the Minister under s. 9(5). No doubt the decision of DGTU conveyed to the applicant in a letter dated 29th March 200 was

made under statutory authority, but not all decision made under statutory authority is subject to judicial review. To me, for a decision to be subjected to judicial review, it must go beyond what is merely administrative or procedural. Moreover in this case the process for the Union recognition is midway before the decision of a Minister under s. 9(5). To entertain the applicant's application would hamper the smooth workings of a claim for recognition as it allows piece meal attacks at every stage of the decision process. Thus, the process for recognition should be allowed to proceed to enable the Minister to decide on the matter as provided by s. 9(5).

A

B

Similarly, in this case before me, at the end of the day the applicant would be able to file an appeal against the decision of the inquiry. Clearly what the applicant is doing is to fragment the decision. It is a ruling rather than a decision which does not dispose of the rights of the applicant. Therefore, it is my considered view that the ruling is not amenable to judicial review.

C

[25] The Act does not provide for the issuance of the compliance notice and this was conceded by the learned counsels for the respondents. According to both counsels the said notice was purely an administrative act. The Senior Deputy Director of Labour in his affidavit (encl. 15) deposed that the compliance notice was issued to the applicant to enable the latter to take remedial steps following an internal inquiry. I do not think that the DGL has prejudged the issue by issuing the compliance notice as it has no binding effect it is evident that when there was no response from the applicant, the summons was issued and the inquiry was set up. The question whether the matter was under sub-s. 69(1)(a) or (b) of the Act will only be decided by the inquiry.

D

E

[26] I find that the compliance notice is unnecessary however it does not render the summons illegal. It is separate and distinct from the summons. Inquiry under s. 69 is independent and stands by itself and is not premised upon any initial investigation. Even if the compliance notice is illegal or unlawful, to my mind, the summons is not tainted. Similar situation can be found in *habeas corpus* cases eg, a detention under the Dangerous Drugs (Special Preventive Measures) Act 1985 where the investigation by the police is independent of the order under s. 6 of the Internal Security Act 1960. In *L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 7 CLJ 653 Abdull Hamid Embong FCJ referring to s. 6(1)(a) of the Act at p. 661 had this to say:

F

G

H

The manner on conducting the investigations and arrests at this stage, is neither a condition precedent nor a matter which has a direct link with the detention order and thus not a ground for judicial review.

I

A [27] If I were to allow this application by quashing the ruling which would
amount to allowing the preliminary objection, that would be the end of the
matter and the first and second respondents have no other recourse. I do not
think that would be proper as here the proceedings have been instituted ie,
the inquiry and s. 86 of the Act only provides where such proceedings have
B been withdrawn. As I said if the preliminary objection is upheld by quashing
the ruling it means that the inquiry is set aside. If that is so the first and
second respondents would not be able to institute a civil suit against the
applicant.

C [28] In the circumstance, the application is dismissed with costs.

D

E

F

G

H

I